

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

**SCOTT G. MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, AND THOMAS L. CLARKE,
DIRECTOR, DIVISION OF MINING
AND RECLAMATION, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Plaintiffs,

v.

Civil Action No. 10-C-57

HAWTHORNE COAL COMPANY, INC.,

Defendant.

CONSENT DECREE

Upon agreement to the terms herein by the parties, Scott G. Mandirola, Director of the Division of Water and Waste Management and Thomas L. Clarke, Director of the Division of Mining and Reclamation (hereinafter collectively, the "Directors") of the West Virginia Department of Environmental Protection (hereinafter "WVDEP") and Hawthorne Coal Company, Inc. (hereinafter "Hawthorne"), the parties agree that it is their intent to resolve the violations of the West Virginia Water Pollution Control Act ("WPCA"), West Virginia Code §§ 22-11-1 *et seq.*, and associated violations of the West Virginia Surface Coal Mining and Reclamation Act ("SCMRA"), West Virginia Code §§ 22-3-1 *et seq.* (collectively, the "Acts"), and violations of the rules and regulations implementing these Acts through this Consent Decree with civil penalties and other duties imposed as expressed herein. After consideration of public comments on this Consent Decree, as proposed, and the parties' responses thereto, the Court enters this Consent Decree.

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the subject matter and the parties hereto pursuant to W. Va. Code §§ 22-11-22 and 22-3-17.
2. Venue is proper in this Circuit Court pursuant to W. Va. Code §§ 22-11-22 and 22-3-17 because Hawthorne is located and doing business in this judicial circuit and because the violations of the Acts and the rules promulgated pursuant to the Acts that are the subject of this action occurred in this judicial circuit.

II. APPLICATION OF CONSENT DECREE

3. This Consent Decree applies to and is binding upon WVDEP and Hawthorne and its successors, as both the permittee of West Virginia Water Pollution Control/National Pollutant Discharge Elimination System (hereinafter "WV/NPDES") Permit No. WV0039471 (the "NPDES Permit") and the permittee of Surface Mining Permit No. D-0184-00 (the "SCMRA Permit").

III. FINDINGS OF FACT

4. The Directors filed a Complaint and then an Amended Complaint (hereinafter "Complaint") in the Circuit Court of Upshur County, West Virginia, against Hawthorne as set forth above in the caption of this Consent Decree. The Complaint alleges that Hawthorne violated the WPCA and the SCMRA through discharges of pollutants from its surface mining facility in Upshur County, West Virginia, which is covered by the NPDES Permit. The SCMRA Permit authorizes surface mining at this mine and the NPDES Permit authorizes discharges from the mine.

Statutory and Regulatory Background

5. WVDEP issued the NPDES Permit pursuant to its authority under the WPCA and pursuant to authority delegated to the WVDEP by the United States Environmental Protection Agency

("USEPA") under the federal Clean Water Act, 33 U.S.C. § 1342, and pursuant to a Memorandum of Agreement between the WVDEP and USEPA for the issuance of NPDES permits.

6. The NPDES Permit contains limits on the concentrations of certain pollutants that can be discharged in the effluent from the mine.

7. Hawthorne has reported the quality of its discharges and other information to the WVDEP pursuant to the terms and conditions of the NPDES Permit. This reporting has occurred through submittal of monthly Discharge Monitoring Reports (hereinafter "DMRs") as prescribed by the WVDEP.

8. Hawthorne's surface mining operation is also covered by the SCMRA Permit, which WVDEP issued on November 26, 1975.

9. WVDEP issued the SCMRA Permit pursuant to its authority under the SCMRA and its status as the primary and exclusive regulator of coal mining in West Virginia. The exclusive regulatory jurisdiction under surface mining law is the result of the United States Office of Surface Mining, Reclamation and Enforcement's approval of the state's regulatory program in January 1981. WVDEP obtained its regulatory primacy by passing a law, SCMRA, which met or exceeded the minimum national standards established by Congress and by demonstrating its capacity to enforce its law. *See* 40 C.F.R. § 948.10.

10. The rules promulgated by the WVDEP implementing SCMRA prohibit violations of effluent limitations contained in a WV/NPDES permit and prohibit any violation of water quality standards resulting from discharges from a mine site. *See* W. Va. Code. St. R. § 38-2-14.5.b.

Violations of Effluent Limits

11. WVDEP's review of DMRs submitted by Hawthorne for the period from June 1, 2007 to March 31, 2011 identified results reported in excess of effluent limits in the NPDES Permit for the following parameters at the following outlets:

Outlet	Parameter(s)
001	Aluminum
003	Manganese
401	Total Residual Chlorine

As part of its review of DMRs, WVDEP also identified results for Iron, Total Suspended Solids, and pH that were in excess of the effluent limits in the NPDES Permit; however, these exceedances were previously the subject of a civil administrative penalty pursuant to Consent Order No. M-08-012 between WVDEP and Hawthorne. This consent order covered exceedances of permit effluent limits for the NPDES Permit prior to July 2008. Consent Order No. M-08-012 is incorporated by reference into this Consent Decree, and the WVDEP hereby confirms that the penalty assessed by it, and paid by Hawthorne, pursuant to Consent Order No. M-08-012 was based upon the factors set forth in Article VI herein, and was adequate and reasonable. WVDEP has reviewed the DMRs for all of the outlets at the NPDES Permits, including those DMRs from the period covered by Consent Order No. M-08-012 and the parties agree that no specific corrective action and/or compliance steps are necessary based on Hawthorne's history of compliance.

IV. EFFECT OF SETTLEMENT

12. The parties recognize the time, resources, expense and complexity associated with litigating the multiple claims asserted by the WVDEP, and as to which Hawthorne has asserted multiple defenses, and further agree that the environmental benefit of an expeditious settlement of this civil action is in the best interest of the parties. As noted in Paragraph 16 below, WVDEP is releasing all

of its rights to assert a claim in the future related to any claims asserted in the Complaint for the period of June 1, 2007 through March 31, 2011. The civil penalty assessed by the Court in this Consent Decree reflects WVDEP's belief that it could prove violations of effluent limits and other allegations raised in the Complaint as well as Hawthorne's belief that the defenses raised in response to those allegations would have eliminated or mitigated any penalty assessment.

13. For the purposes of this Consent Decree, Hawthorne agrees the Complaint states claims upon which relief can be granted.

14. The parties agree that the civil penalties to be paid by Hawthorne pursuant hereto satisfy all claims that may be asserted for civil penalties under the Acts for the discharge of any pollutant regulated by the NPDES Permit from June 1, 2007 through March 31, 2011.

15. The WVDEP has evaluated the DMRs for all permitted outlets, agency records regarding the NPDES Permit, and other related information and has completed an evaluation of Hawthorne's compliance record. In completing this evaluation, the WVDEP has considered whether reported results for any other parameter which may have had a "report only" requirement were in fact violations of the NPDES Permit or any applicable statutory or regulatory requirement. WVDEP exercised its enforcement discretion in determining that no such exceedances or violations that rise to the level of an enforcement action have occurred here.

16. This Consent Decree shall act as a bar, full accord and satisfaction and have the effect of *res judicata* for any claim or cause of action brought or that may have been brought by the WVDEP, including injunctive relief, for violations of the NPDES Permit and the associated violations of the SCMRA Permit and associated performance standards, or violations of water quality standards,

during the period from June 1, 2007 through March 31, 2011 pursuant to 33 U.S.C. § 1365(a)(1)(A) and 30 U.S.C § 1270.

V. ORDER FOR COMPLIANCE

17. Now, therefore, in accordance with Chapter 22, Article 11, Section 1, *et seq.*, and Chapter 22, Article 3, Section 1, *et seq.*, of the West Virginia Code, it is hereby agreed between the parties and ORDERED by the Court that Hawthorne shall immediately take measures to initiate compliance with all effluent limitations for all outlets governed by the NPDES Permit.

VI. CIVIL PENALTIES

18. In settlement of WVDEP's claims in its Complaint relating to reported violations of the WPCA and the NPDES Permit and for relief under W. Va. Code §§ 22-11-22 and 22-3-17, Hawthorne, without admitting liability for any alleged violations or agreeing to the appropriateness of the civil penalty expressed herein except in the context of this Consent Decree, agrees for purposes of the settlement provided herein that it shall pay a total civil penalty in the amount of twenty-nine thousand dollars (\$29,000), which includes consideration by WVDEP of relevant civil penalty assessment factors, including, but not limited to deviation from requirements, potential harm to the environment, potential economic benefit from any non-compliance, and history of compliance.

- a. Hawthorne shall pay a total cash penalty of twenty-nine thousand dollars (\$29,000) by certified or cashier's check to the WVDEP for deposit in the WVDEP's Stream Restoration Fund, payable within 60 days of the entry of this Decree.
- b. Payments shall be mailed to the following address:

Jeff McCormick, Assistant Director
West Virginia Department of Environmental Protection
Environmental Enforcement
601 57th Street SE

Charleston, WV 25304.

19. For violation of any final effective effluent limit in the NPDES Permit Hawthorne shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For violations of daily maximum limits from January 1, 2011 through the entry of this decree, Hawthorne shall pay \$1,500 per violation.
- b. For violations of average monthly limits from January 1, 2011 through the entry of this decree, Hawthorne shall pay \$4,500 per violation.

20. For failure to make any payment as required herein, Hawthorne shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For the 1st through 15th day of noncompliance, Hawthorne shall pay \$500 per day per violation;
- b. For the 16th through 30th day of noncompliance, Hawthorne shall pay \$750 per day per violation;
- c. For any period of noncompliance after the 30th day, Hawthorne shall pay \$1,000 per day per violation.

21. Stipulated penalties under paragraphs 19 and 20 shall be payable within thirty (30) days of receipt of a written demand from the WVDEP. Such payments shall be made by certified or cashier's check payable to the West Virginia Department of Environmental Protection and delivered to the address specified in Paragraph 18.b. for deposit in the Stream Restoration Fund.

VII. FORCE MAJEURE

22. If any event occurs that causes or may cause a violation of any provision of this Consent Decree by Hawthorne, Hawthorne shall notify the WVDEP in writing within ten (10) days of the

date on which it had knowledge or should have had knowledge that the event may or will cause a violation. Writing may include the use of electronic mail at an e-mail address provided for the Assistant Director of the Division of Mining and Reclamation – Inspection and Enforcement. The notice shall describe the anticipated duration of the violation, the precise cause or causes of the violation, the measures taken and/or to be taken by Hawthorne to minimize the violation, and the timetable by which those measures will be implemented. Hawthorne will adopt all measures to avoid or minimize any such violation. Hawthorne shall make all efforts to identify events that cause or may cause a violation of this Consent Decree.

23. If the WVDEP agrees that any violation of this Consent Decree is caused by circumstances reasonably beyond the control of Hawthorne, Hawthorne shall be excused as to that violation for the period of time the violation continues due to such circumstances. Hawthorne's time for performance shall be extended for a period not exceeding the delay actually resulting from such circumstances. In the event the WVDEP does not agree, then Hawthorne may submit the matter to this Court for resolution. The burden of proving that any delay was caused by circumstances reasonably beyond the control of Hawthorne and the length of such delay shall rest with Hawthorne. Failure by Hawthorne to comply with the notice requirements in Paragraph 19 shall render this paragraph void and of no force and effect as to the particular incident involved and shall constitute a waiver of Hawthorne's rights under this provision to obtain an extension of its obligations based on that incident.

24. Compliance with any requirement of this Consent Order, by itself, shall not constitute compliance with any other requirement. Hawthorne must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

VIII. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION

25. The Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree until the Decree is terminated as set forth below. Additionally, should either party believe that the other has failed or is failing to comply with the terms of this Order, it may petition this Court for a resolution of the issue.

IX. PERMITS AND OTHER LAWS AND REGULATIONS

26. This Consent Decree is not, and shall not be interpreted to be, a permit or modification of a permit under the WPCA, nor shall it relieve Hawthorne of any other obligation imposed by the WPCA, the NPDES Permit, or any permit issued under the WPCA, except as expressly provided herein, nor shall it in any way relieve Hawthorne of its obligation to comply with any other federal or state law or any rule or regulation in any way related to the substance of this Consent Decree. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

XV. PUBLIC NOTICE

27. The parties acknowledge and agree that final approval of this Consent Decree is subject to public notice and comment as provided in 47 C.S.R. § 30-15.2.c. Hawthorne shall be responsible for paying any and all fees or charges associated with the publication of a public notice regarding this Consent Decree. The public shall have at least thirty (30) days in which to make any comments on this Consent Decree and the WVDEP reserves the right to withhold or withdraw its consent or propose modifications to this Consent Order if warranted based on comments received during the period for public comments. If the WVDEP modifies this Consent Decree in response to public comments, Hawthorne may either consent to, or withhold consent to, entry of the modified Consent

Decree. If the WVDEP makes no changes in response to public comments, Hawthorne consents to entry of this Consent Decree without further notice. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is not binding on and is of no effect on the parties.

XVI. EFFECTIVE DATE

28. The effective date of this Consent Decree shall be the date upon which it is entered by the Court as a final judgment and order.

XVII. TERMINATION

29. Termination of this Consent Decree shall be by order of the Court upon application by either party, provided that all of the following conditions have been met: (1) Hawthorne has achieved complete compliance with all requirements of this Consent Decree; (2) Hawthorne has paid all civil and stipulated penalties required herein; and (3) all motions and other proceedings concerning this Consent Decree have been completed and are no longer subject to further judicial review and all relief resulting from such motions or other proceedings have been fully satisfied.

XVIII. SIGNATORIES AUTHORIZED

Each of the signatories to this Consent Decree certifies that (s)he is fully authorized to enter into the terms and conditions of this Consent Decree and to bind legally the party to the Decree Order so represented by her or him.

It is so ORDERED this _____ day of _____, 2011.

We hereby consent to the entry of this Decree:

Scott G. Mandirola, Director, Division
of Water and Waste Management
West Virginia Department of Environmental Protection

Date

Thomas L. Clarke, Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection

Date

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Date